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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 934

WALTER A. WOOD,

Petitioner,

—*v*—

HELENA A. WOOD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SIMON H. RIFKIND
MARTIN KLEINBARD
MARK H. ALCOTT
575 Madison Avenue
New York, N. Y. 10022

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON,
Of Counsel.

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OPINIONS BELOW

The opinion of the New York Court of Appeals, affirming 5 to 1 (one judge not sitting) the decision of the Appellate Division, is reported at 16 N. Y. 2d 64, 74, 209 N. E. 2d 709, 713, together with the opinion in the companion case of *Rosenstiel* v. *Rosenstiel.* The unanimous decision of the New York Court of Appeals, denying without opinion the motion for reargument or to amend the remittitur, is reported at 16 N. Y. 2d 993.

QUESTIONS PRESENTED

1) Is New York constitutionally required not to recognize a foreign nation divorce decree, rendered in full conformity with that nation's laws upon the appearance of both parties, when the decree is collaterally attacked by a subsequent spouse with knowledge who married on the strength of that decree?

2) Should a petition for certiorari be granted to review alleged federal constitutional issues which were asserted for

the first time on appeal, when state law requires such issues to be raised at trial?

3) Is a petition for certiorari timely where the final order of the state court is entered on July 9, 1965, and the petition filed on January 20, 1966?

STATUTE INVOLVED

28 U. S. C. § 2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT

Petitioner asserts that he has a constitutional right to have New York treat as null and void a marriage he freely contracted—not once but twice—with full knowledge of his wife's prior Mexican divorce. He argues that one who enters such a marriage with full expectation of its *validity* is deprived of his constitutional rights unless his expectation is frustrated by a judicial declaration of *invalidity*. He asks this Court to give constitutional protection to a "marriage-at-will" relationship in which the wife is bound by the marriage contract but the husband is free to terminate it at any time.

The parties to the challenged Mexican divorce proceeding were respondent and her former husband, Kenneth Meredith. Neither of them has attacked that proceeding; indeed, both remarried on the strength of it. Neither ever contended that the Mexican proceeding was a deprivation of due process of law. Meredith died before this action

was commenced (W*284). The only consequence of a successful challenge by petitioner, therefore, will be to destroy an existing marriage, not to restore a prior marriage. Petitioner contends he has a constitutional right to achieve this result.

The New York Court of Appeals thinks otherwise. It explicitly found that the case at bar does not present a federal question. On October 28, 1965, it denied petitioner's motion to amend its remittitur to assert therein that the appeal "presented and necessarily passed upon questions under the United States Constitution". 16 N. Y. 2d 993.

The claim that the case does present federal questions is one that petitioner has only recently espoused. In his pleadings, at trial, and on appeal to the Appellate Division of the New York Supreme Court, petitioner based his claim solely on New York law. He recognized that the United States Constitution does not address itself to New York's right to recognize the divorce decree of a foreign nation. Only in the Court of Appeals did petitioner make cursory reference to the Fourteenth Amendment, and not even the Court of Appeals had the benefit of hearing petitioner's novel theory that "federal common law" precluded New York from recognizing a foreign divorce decree not offensive to its public policy.

We urge this Court to deny the petition for the following reasons: First, petitioner's arguments are supported neither by precedent nor by reason, and the case does not present a federal question. Second, petitioner has waived his right to assert these arguments. Third, the facts of this

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*References in parentheses preceded by "H" and "W" are to pages in the printed appendices filed in the New York Court of Appeals by petitioner and respondent respectively. References preceded by "A. P." are to the Additional Papers printed at the end of the Appendix filed by the petitioner in the New York Court of Appeals. References preceded by "Pet. Br." and "Pet. App." are to pages in petitioner's brief in support of this petition for a writ of certiorari and the printed appendix to that brief.

case do not justify this Court, in its discretion, issuing a writ. Fourth, the petition is not timely.

ARGUMENT

I. Neither the Constitution nor Federal Policy Required New York to Deny Recognition to the Mexican Decree, and No Federal Question Is Presented.

Under the laws of the State of Chihiahuah, Republic of Mexico, the courts of that Mexican state may assert jurisdiction in an action for divorce if the plaintiff is physically present and the defendant appears by attorney (Pet. App. 26). Respondent and her prior husband Meredith followed this procedure, with respondent appearing in person (W. 52-3).

After that divorce, petitioner and respondent met and subsequently were married in France. In procuring the French marriage license, respondent disclosed to the authorities that she was divorced from her prior husband. As the trial court found (W. 53), petitioner knew of the divorce and had every opportunity to learn the details of it before he married respondent, for the first time, in France. Upon the Woods' return to the United States, when the validity of their French marriage was questioned because of a possible failure to meet French residence requirements, the parties procured a license and married again—this time in New York. Before licensing the marriage, New York required the Woods to submit a copy of respondent's Mexican divorce decree to officials at the New York City Corporation Counsel's office, which inspected and approved the decree (W. 498). The parties were duly married after their application for a New York marriage license was granted.

Petitioner claims that this act—and its subsequent ratification by the courts—deprived him of his constitutional rights. According to petitioner, New York should have rejected his application and denied his request, or it should

have permitted him to enter the marital relationship and then retroactively withdrawn that permission. This, we are told, is the result required by the Constitution and "our place in the civilized world" (Pet. Br. 17).

To succeed in his assertion of a deprivation of constitutional rights, petitioner must show some legitimate property interest or expectation which was frustrated by the action of the state. But petitioner has never explained what New York took from him in recognizing the Juarez decree. Did New York deprive petitioner of his constitutional right not to be married to respondent? Did petitioner have a right to expect, at the time of his two marriages to respondent, that she was not free to marry him? Did he have a right to expect that the marriage ceremonies in which he participated and the married life he led with respondent was nothing but sham? Does the Constitution protect petitioner's expectation that a decree he treated and urged the authorities to treat as valid was actually invalid?

We submit that the only reasonable expectancy interest which accrued to petitioner as a result of respondent's Juarez divorce was the expectancy that the divorce was valid and could be relied upon. The trial court found as a fact that petitioner and respondent had this expectation; both "believed that the Mexican divorce was valid in all respects and that the marriage ceremonies which they entered into in France and in New York City duly created the relationship of husband and wife between them, both in law and in fact" (W. 53). Petitioner would be injured if the state subsequently *refused* to recognize the validity of that decree, thereby defeating his expectation and depriving him of the marital status he sought and justifiably assumed to be secure. But when the state recognized the validity of the Juarez decree and upheld petitioner's expectation he was deprived of nothing, and his constitutional rights were not infringed.

The due process clause is not a vague injunction against loose judicial proceedings; it prohibits depriving any "person" of his "life, liberty or property" without "due process of law". Hence, it is only empty phrase-making to claim that the Juarez court "denied due process"—or would have, if it had been an American court—without specifying the *person* who was deprived, and the *liberty* or property of which he was deprived, without due process of law. The only parties to the Juarez proceeding were respondent and her former husband, Kenneth Meredith. Neither of them was deprived of life by the decree, or of liberty, or of property, except that both parties waived certain estate rights and entered into provisions with respect to the payment of alimony to respondent. But respondent is not complaining of the Juarez court's action, nor could she under the New York law of estoppel (*Krause* v. *Krause,* 282 N. Y. 355, 26 N. E. 2d 288 (1940)). Nor is or could the deceased Meredith complain of the Mexican decree. Hence, no one was deprived of anything without due process of law.

There is no more merit to the suggestion that the due process clause might be violated if someone tried to "enforce" the Juarez decree in New York. No one is trying to "enforce" the divorce decree against petitioner. Respondent simply asserted her marital rights, secured to her by her marriage in New York. This factor makes *Home Ins. Co.* v. *Dick,* 281 U. S. 402 (1929), cited by petitioner, totally irrelevant. There defendant was being deprived of his property without due process in that plaintiff was trying to collect on a constitutionally infirm judgment *against defendant.* Here, the Juarez decree did not run against petitioner, and no one is trying to take anything from petitioner under that decree. Rather, it is petitioner who affirmatively seeks to contest the validity of the decree, to which he was a stranger.

Petitioner contends that the decision below conflicts with decisions of this Court and other courts. But petitioner cites no case holding that the Constitution regulates a state's right to recognize any foreign divorce decree, much less a decree rendered on the appearance of both parties in full conformity with the laws of a friendly foreign nation.

It is argued that the Constitution required New York to reject the decree of a foreign country whose jurisdiction was not founded on domicile or residence. Although sister state decrees are constitutionally entitled to full faith and credit, the Constitution does not attempt to regulate state court recognition of the divorce decrees of a foreign country. New York takes the view that a foreign nation's divorce decree will be recognized unless offensive to the state's public policy. *Gould* v. *Gould,* 235 N. Y. 14, 29, 138 N. E. 490, 494 (1923). On that issue, New York is the sole and final arbiter.

New York concluded that the Mexican decree attacked in the case at bar does not offend its public policy (Pet. Ap. 26). While we contend that this conclusion is not open to challenge here, we do not hesitate to assert that this conclusion does not conflict with "commonly held notions . . . throughout the civilized world" (Pet. Br. 6). Mexico does not predicate its jurisdiction on significantly different contacts than are required by others whose decrees receive routine recognition. New York, for example, has since 1862 asserted jurisdiction in matrimonial actions if the parties were married in New York even though they have no other contact with the state (Domestic Relations Law § 170 (2)). Decrees resulting from this assertion of jurisdiction have not been refused recognition by other states; such recognition has not been held to constitute a denial of due process. The constitutionality of this statute was upheld in *David-Zieseness* v. *Zieseness,* 205 Misc. 836, 129 N. Y. S. 2d 649 (Sup. Ct., N. Y. Co. 1954).

The cases cited for the proposition that recognition of this Juarez decree deprives petitioner of property without due process of law do not support that contention. *Alton* v. *Alton,* 207 F. 2d 667 (3d Cir. 1953) rested on the conflict between the Virgin Islands statute and the Organic Act enumerating the territorial legislature's powers. The remark about due process of law is mere dictum which was expressly rejected by the only three Justices of this Court to reach that issue in the subsequent case of *Granville-Smith* v. *Granville-Smith,* 349 U. S. 1 (1955). The majority in that case, as in *Alton,* based their decision on the Organic Act, and did not reach the constitutional issue. Justice Clark in his dissent, joined by Justices Black and Reed, did reach the constitutional argument and dispatched it summarily in the following terms:

> "The constitutional questions presented on brief and at argument involved the Due Process Clause of the Fifth Amendment, the Full Faith and Credit Clause, and the Tenth Amendment. First of all, neither of the Granville-Smiths claims to have been deprived of life, liberty, or property without due process of law. *While the State has an interest in the marital relationship, certainly this interest does not come within the protection of the Due Process Clause.* Likewise, full faith and credit is not applicable. Mrs. Granville-Smith is not asking that this Court make her divorce, if granted, valid in the States. That issue is not here and may never be. All she asks is that the Islands be permitted to proceed under their own law." (349 U. S. 1, 26-27) [Emphasis added].

The second facet of this argument is likewise devoid of support. Petitioner claims that recognition of foreign

decrees rests on the choice of law applied. He argues that the Mexican court's application of Mexican rather than New York law in the divorce action to which he was not a party deprives him of his constitutional rights. But surely the New York courts may determine whether their residents may be affected by the law of another jurisdiction. The only case cited by petitioner is *Hanson* v. *Denckla,* 357 U. S. 235 (1958), where, as petitioner concedes, the decision rested on lack of jurisdiction in the rendering state court, not choice of law. The decree challenged in *Hanson* v. *Denckla, supra,* was a sister-state rather than a foreign nation decree. The question of recognition was whether the Constitution *required* Delaware to recognize the Florida decree, not whether the Constitution would be offended if Delaware had chosen to do so. Furthermore, this Court had first reversed the Florida judgment, holding that it was not valid in Florida under Florida law; here the Mexican decree was concededly valid in Mexico (W. 53).

The final proposition, that the Court should announce a federal common law precluding the recognition of this type of decree, is supported by no authority whatsoever. The concept of federal common law has long been in recession. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938).

Banco Nacional de Cuba v. *Sabbatino,* 376 U. S. 398 (1964), involved the acts of foreign executives, rather than the judgment of foreign courts. Furthermore, the whole thrust of that decision was to avoid damage to the nation's foreign relations by a state court's *refusal* to recognize the acts of a foreign government. No such issue is raised here.

There is no reason why New York should not be permitted to determine questions affecting the status of its own residents and domiciliaries such as this petitioner and this respondent. If New York chooses to recognize a foreign

decree which affects that status, no federal question is presented.

Even if a rule such as that urged by petitioner were to be adopted, it should be applied only in sensitive cases such as those involving recognition of foreign governments where the federal government has a strong interest. Here there is no issue as to the competence of the Mexican court, the legal status of its government, or the friendliness of Mexican-American relations.

We have addressed ourselves to the merits of petitioner's arguments. We contend, however, that these arguments are frivolous and that the case does not present a federal question. A litigant cannot interject a federal question into a case, to give this Court jurisdiction, simply by uttering the magic words "due process of law" or "federal policy". In his recent motion to the New York Court of Appeals, petitioner asked the court to acknowledge that his arguments raise federal questions, even if it rejected those arguments on the merits. The court denied that motion. Its conclusion that no federal question is raised by the case at bar should not be disturbed by this Court.

II. Petitioner May Not Now Raise Issues Which Were Not Presented Before the Case Reached the Court of Appeals.

As we have pointed out above, petitioner made no effort to assert his constitutional rights or to raise any federal questions in his complaint, at trial, or in the Appellate Division.

Petitioner points to certain language in Judge Coleman's opinion to support the claim that the trial court "clearly recognized and considered the federal questions inherent in the case" (Pet. Br. 3). The fact is, however, that Judge Coleman's opinion, in the language quoted at

page 4 of petitioner's brief, simply emphasizes that the case does *not* involve the due process clause of the Fourteenth Amendment or the full faith and credit clause. The opinion contrasts the example of a sister state decree which, in the trial judge's view, might be attacked under the due process clause. It is clear that Judge Coleman's very point was that an attack based on the due process clause could not be made in the instant case, which does not involve a sister state decree.

Moreover, the concept underlying the waiver doctrine is that the party asserting constitutional rights must *raise* the issue in the court of the first instance. The reluctance of appellate courts to consider constitutional issues which have not been considered below stems from a reluctance to declare that a lower court judge has committed error when, in fact, he never had an opportunity to decide the issue in the first place. Thus, regardless of what Judge Coleman may or may not have said in an aside in his opinion, the significant fact is that petitioner never claimed that his constitutional rights were involved until the case reached the Court of Appeals, three years after the complaint was served.

Petitioner claims that until the Appellate Division recognized the Juarez decree his constitutional rights were not denied and, therefore, he could not raise the constitutional issue until that time. But the reasoning underlying the waiver doctrine is that only if a litigant informs the courts that a prospective ruling might deprive him of his constitutional rights can an adverse ruling be considered erroneous. If petitioner's view of the law were correct, a litigant would never be required to raise constitutional issues at trial, for only after the trial court reached a decision could his rights be infringed. The waiver doctrine would thus be meaningless.

Furthermore, it should be noted that the State of New York recognized this Mexican decree long before the Ap-

pellate Division's decision. The "deprivation of rights" first occurred when the state officials granted the marriage license to the parties, after examining respondent's Mexican decree. Even under petitioner's view, therefore, he had ample reason to raise this issue at trial.

New York has always followed the rule that constitutional issues cannot be raised for the first time on appeal; a constitutional issue not raised at trial is waived.

> "Constitutional questions cannot for the first time be raised in this court. [Citations omitted.]" *Nathan* v. *Equitable Trust Company,* 250 N. Y. 250, 253, 165 NE 282 (1929).

The rule has been applied consistently, barring attempts to raise constitutional issues for the first time in the Appellate Division as well as in the Court of Appeals. *Eddy, Inc.* v. *Fidelity & Deposit Company,* 265 N. Y. 276, 282, 192 N. E. 410, 412 (1934); *Marie Von Diezelski* v. *Food Fair Stores, Inc.,* 18 A. D. 2d 724, 236 N. Y. S. 2d 603 (2d Dep't 1962); *Matter of Robusto,* 277 App. Div. 1008, 100 N. Y. S. 2d 370 (2d Dep't 1950).

This Court has consistently refused to consider constitutional issues not raised at trial if the state court follows such a policy. *Beck* v. *Washington,* 369 U. S. 541 (1962).

Each of petitioner's arguments is a constitutional argument, resting on either the due process clause or the supremacy clause. None was raised at trial or in the Appellate Division. Under these circumstances, the petition should be denied.

III. This Court, in the Exercise of its Discretion, Should Deny the Petition

In urging this Court to exercise its discretion by denying this petition, we point first of all to the basic inequity of petitioner's position. He knew of respondent's prior Mexi-

can divorce. He urged French and then New York officials to recognize the validity of that divorce by granting him a license to marry respondent. During the years he lived with respondent as man and wife, his conduct asserted to the world that the prior divorce was valid. Now, when it suits his convenience, he attacks the Mexican decree upon which he and respondent relied for so long.

So offensive to the conscience is this legal sleight-of-hand that at least two of the five justices of the Appellate Division expressed the view that petitioner is estopped to challenge the Mexican decree (A. P. 12-15). The other justices and the Court of Appeals did not reach the issue of estoppel. Petitioner himself recognizes that his argument fails if the principle of estoppel applies; he has framed the "question presented" on the assumption that he is not estopped (Pet. Br. 2). We believe that the equitable considerations underlying the doctrine of estoppel are present in this case and are sufficient to warrant a discretionary denial of the petition.

If petitioner is correct and he is not estopped, his overall position is even more unjust. For it is clear that, as a matter of state law, repsondent, having secured the Mexican divorce, is estopped from challenging it. *Krause* v. *Krause, supra; Packer* v. *Packer,* 6 A. D. 2d 464, 179 N. Y. S. 2d 801 (1st Dep't 1958). Respondent could not secure a declaration of nullity of her marriage to petitioner, but petitioner could at any time. Thus he is in the happy position of having a marriage-at-will relationship. We respectfully suggest that this Court has discretion to refuse to consider a legal theory leading to such a bizarre and inequitable result.

Furthermore, we believe that the arguments asserted in Points I and II—that there is no injury because no expectation was frustrated, and that petitioner should not be permitted to raise the constitutional "issues" for the first

time at such a late date—not only refute petitioner's arguments on the merits but also justify a discretionary denial of the petition. The afterthought of this remote and metaphysical constitutional injury does not deserve the serious consideration of this Court.

Finally, we remind the Court that the marital status of more than 200,000 New Yorkers, and countless thousands in other states, would be jeopardized by the reversal of the decision of the New York Court of Appeals (Pet. App. 21). That decision has prompted New York to move for the first time toward a revision of its ancient divorce law, and legislation to that effect is now pending before the New York Legislature. Under these circumstances, and particularly at this time, we respectfully urge the Court to refrain from entering the delicate area of matrimonial law, which has traditionally been reserved to the states (*Williams* v. *North Carolina* [II] 325 U. S. 226, 233 (1945)).

IV. The Petition Is Not Timely, and Should Be Dismissed

The petition for certiorari was required to be filed "within ninety days after the entry of [the] judgment or decree." 28 U. S. C. § 2101(c). The Court of Appeals entered its final order on July 9, 1965. This petition was not filed until January 20, 1966; accordingly, it is untimely.

Certain ministerial acts occurred in the lower court subsequent to the entry of the order by the Court of Appeals, but none affected or could have affected the determination made in the Court of Appeals. On July 23, 1965, the Court of Appeals' order was filed in the office of the Clerk of the County of New York, and on August 13 an order was entered in the New York County Clerk's office making the order of the Court of Appeals the order of the New York Supreme Court. Petitioner himself relies on July 9 as the date of the judgment or decree sought to be reviewed (Pet.

Br. 2). Regardless on which of the above dates started the running of the 90 days within which to file the petition, the time had run long before this petition was filed on January 20, 1966.

Although final judgment was not entered *in the lower court* until later, this entry of judgment was a mechanical act by the clerk which in no way affects the rights of the parties or extends their time to seek review here. So this Court has explicity held. As the leading text writers have commented:

> "The order or judgment of the highest state court is controlling as to the running of the time even though under the state practice (as in New York and Massachusetts) the actual judgment is that entered by an inferior state court on remand, remittitur, or rescript. *Department of Banking* v. *Pink,* 317 U. S. 264; *Cole* v. *Violette,* 319 U. S. 581. In such cases the function of the lower state court is the ministerial one of entering the judgment . . .". Stern & Gressman, *Supreme Court Practice* 304 (3d. ed., 1962).

Petitioner can only contend that the 90 days did not begin to run until the Court of Appeals denied his motion for reargument and to amend the remittitur. The statute (28 U. S. C. § 2101(c)) makes no such provision, but it has been said that "If the rules of the lower court allow a petition for rehearing or new trial to be filed within a prescribed number of days, and the petition is filed within that period, the 90 days begins to run from the date of the lower courts order denying the petition for rehearing." Stern & Gressman, *op. cit.,* p. 205. However, New York law provides no time limit for making such a motion. Cohen & Karger, *Powers of the New York Court of Appeals* 443 (1952). If the decision denying the motion for reargument is the key date, therefore, a petition for certiorari would be timely

even many months after the decision for which review is sought.

As for the motion to amend the remittitur, the treatises state:

> ". . . a motion for a change in the court's opinion or for an amendment of a remittitur (in New York) to add the statement that a federal question was presented and necessarily decided does not extend the time, since such a motion would not affect the judgment already entered. *Department of Banking* v. *Pink,* 317 U. S. 264, 266." Stern & Gressman, *op. cit.,* p. 206.

Perhaps the time limit should be tolled after the making of a motion for reargument, pending its determination. Here the motion was brought on October 1, 1965, and denied by the Court of Appeals on October 28, 1965. Even if these 28 days are excluded from the computation, and even if the time is computed from August 13, 1965, the most remote of the possible statutory dates, the 90 days expired long before this petition for certiorari was filed on January 20, 1966.

The petition is untimely and should be dismissed.

CONCLUSION

For the reasons given, the petition should be dismissed as untimely or denied.

Respectfully submitted,

SIMON H. RIFKIND
MARTIN KLEINBARD
MARK H. ALCOTT
575 Madison Avenue
New York, N. Y. 10022

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON,
Of Counsel.

Dated: February 25, 1966.